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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/034,545	12/21/2001	Jurgen Harms	70301/56786	1414
21874	7590	06/02/2004	EXAMINER	
EDWARDS & ANGELL, LLP P.O. BOX 55874 BOSTON, MA 02205			PHILOGENE, PEDRO	
			ART UNIT	PAPER NUMBER

3732

DATE MAILED: 06/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/034,545

Applicant(s)

HARMS ET AL.

Examiner

Pedro Philogene

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 March 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 5-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 5-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 5-11 are rejected under 35 U.S.C. 102(a) as being anticipated by Lang et al. (WO 00/23013).

With respect to claim 5, Lang discloses in FIGS. 1 and 3 and the abstract a space-maintainer for inserting between two vertebral bodies (see title), the space-maintainer comprising a sleeve-shaped part (2) having a longitudinal axis (see 3); a second part (1) guided therein (see FIGS. 1,3), the second part being displaceable in an axial direction relative to the first part (see abstract, lines 4-5); a device connecting the sleeve-shaped first part and the second part, the device comprising a first component (5) having toothed profile extending parallel to the longitudinal axis (see FIG.1) and a second component (fixed ring 15; page 9, line 16) having a toothed wheel (ring 15 is wheel) located for engagement with the toothed profile (see Fig.1) of the first component, wherein the first component is attached to the sleeve-shaped first part and the second component is attached to the second part (through the cavity (37) the ring is secured or connected to the second part) so that a rotary movement of the toothed wheel is converted into a movement displacing the second part relative to the sleeve-shaped first part in the axial direction for adjusting a total length of the sleeve-shaped

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first part and the second part; as set forth, in corresponding U.S 6,524,341, in column 3, lines 52-57, column 5, lines 17-20, lines 25-26.

With respect to claims 6-11, Lang discloses a toothed wheel mounted in the sleeve shaped first part; as best seen in FIGS.1, 3; the second part comprising an outer surface and a grid section extending in an axial direction; as best seen in FIG.1, 3, consisting of a plurality of indentations (27) and a stopping part (28) that cooperates with the grid section; a rotary instrument, as set forth in page 10, lines 15-19, which can engage the toothed wheel for changing a rotary position of the toothed wheel.

### ***Response to Amendment***

Applicant's arguments filed 3/17/04 have been fully considered but they are not persuasive. Applicant stated that the affixation ring cannot function as a claimed tooth wheel, but the examiner begs to differ. Applicant's attention is directed to column 3, lines 52-57 of the corresponding US patent # 6,524,341, where it is disclosed that the affixation ring can be rotated to a position B to adjust the length of the implant and rotated back to lock the adjusted length. In column 5, lines 17-20, Lang et al further disclose that in position B (the position in which the ring is rotated to allow axial movement) the couplings are disengaged to allow the bodies to freely displace relative to each other in the direction of the central axis. Therefore, it is inherent that affixation ring of Lang et al can function as the claimed tooth wheel of the application.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

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§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (703) 308-2252. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Pedro Philogene  
May 27, 2004

  
PEDRO PHILOGENE  
PRIMARY EXAMINER